

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

JESUS OLIVAREZ VEGA,	)	No. CV-F-05-389 OWW
	)	(No. CR-F-02-5408 OWW)
)	
Petitioner,	)	MEMORANDUM DECISION AND
	)	ORDER DENYING PETITIONER'S
vs.	)	MOTION TO VACATE, SET ASIDE
	)	OR CORRECT SENTENCE PURSUANT
	)	TO 28 U.S.C. § 2255 AND
UNITED STATES OF AMERICA,	)	DIRECTING CLERK OF COURT TO
	)	ENTER JUDGMENT FOR
	)	RESPONDENT
Respondent.)	
)	
)	

On March 24, 2005, Petitioner Jesus Olivarez Vega timely filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

Petitioner pleaded guilty pursuant to a written Plea Agreement to conspiracy to aid and abet the manufacture of methamphetamine and to possess pseudoephedrine while believing it would be used to manufacture methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. Petitioner was sentenced on March 29, 2004 to 135 months incarceration.

1 Petitioner did not file an appeal to the Ninth Circuit.

2 The Second Superseding Indictment charged Petitioner and
3 others with conspiring "to aid and abet the manufacture of 50
4 grams or more of methamphetamine ... and to possess
5 pseudoephedrine, a listed chemical, knowing or having reasonable
6 cause to believe it would be used to manufacture
7 methamphetamine." The written Plea Agreement provided:

8 The defendant understands that the law gives
9 him a right to appeal his conviction and
10 sentence. The defendant waives any right to
11 appeal his conviction and sentence and any
12 right he may have to bring any other post-
conviction attack on his conviction and
sentence. He specifically agrees not to file
a motion under 28 U.S.C. § 2255 or § 2241
attacking his conviction and sentence.

13 Pursuant to the Plea Agreement, Petitioner agreed to the
14 following facts:

15 Between on or about August 1, 2002, and
16 August 3, 2002, in the County of Stanislaus,
within the State and Eastern District of
17 California, and elsewhere, the defendant
knowingly and intentionally agreed and
18 conspired with MARCO ANTONIO NEGRETE SAENZ,
MANUEL SOLORZANO CONTINO aka Victor Sanchez
Sepulveda, GILBERTO MALDONADO, and JAVIER
19 VILLAVICENCIO to aid and abet the manufacture
of methamphetamine and to possess
20 pseudoephedrine, a listed chemical, knowing
or having reasonable cause to believe it
21 would be used to manufacture methamphetamine,
a controlled substance. Specifically, during
22 that time frame, the defendant knowingly and
intentionally agreed and conspired with his
23 co-defendants to purchase from a confidential
informant in Turlock twenty cases of
24 pseudoephedrine for the purpose of cooking or
manufacturing 'crank' or methamphetamine.
25 Twenty cases of pseudoephedrine is capable of
producing approximately 34 pounds of actual
26 methamphetamine.

1 The Plea Agreement set forth the elements of the offense to which
2 Petitioner pleaded guilty, including that, "[i]n addition, the
3 government is required to prove beyond a reasonable doubt that:
4 [¶] ... The conspiracy involved 50 grams or more of
5 methamphetamine." The Plea Agreement advised that Petitioner's
6 sentence would be determined under the Sentencing Guidelines,
7 that the Court was not a party to the Plea Agreement and was free
8 to impose the maximum penalty, and that the maximum potential
9 sentence was a mandatory minimum of ten years and a maximum of
10 life imprisonment.

11 A defendant may waive the statutory right to bring a Section
12 2255 motion challenging the conviction or sentence. *United*
13 *States v. Pruitt*, 32 F.3d 431, 433 (9th Cir.1994); *United States*
14 *v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.1992), *cert. denied*, 508
15 U.S. 979 (1993). The Ninth Circuit ruled that "a plea agreement
16 that waives the right to file a federal habeas petition pursuant
17 to 28 U.S.C. § 2254 is unenforceable with respect to an IAC claim
18 that challenges the voluntariness of the waiver." *Washington v.*
19 *Lampert*, 422 F.3d 864, 871 (9th Cir.2005), *cert. denied*, 547 U.S.
20 1074 (2006). Petitioner makes no claim in his Section 2255
21 motion that he was denied the effective assistance of counsel or
22 that the waiver of his right to collaterally attack his
23 conviction and sentence was not knowing and voluntary because of
24 ineffective assistance of counsel. Consequently, Petitioner
25 cannot challenge his conviction or sentence pursuant to Section
26 2255.

1 Further, Petitioner's claims are without merit.

2 Petitioner contends that he is entitled to relief because
3 "[t]here was no element of a drug amount in the indictment."
4 However, drug quantity is not an element of the offense. See
5 *United States v. Thomas*, 355 F.3d 1191, 1194-1195 (9th Cir.2004);
6 *United States v. Toliver*, 351 F.3d 423, 430 (9th Cir.2003), *cert.*
7 *denied*, 541 U.S. 1079 (2004).

8 Petitioner argues that the Second Superseding Indictment
9 "failed to allege that mere possession of pseudoephedrine is a
10 criminal act." Petitioner's claim is belied by the language in
11 the Second Superseding Indictment, i.e., that Petitioner
12 conspired to possess pseudoephedrine, a listed chemical, "knowing
13 or having reasonable cause to believe it would be used to
14 manufacture methamphetamine." Petitioner claims that the Second
15 Superseding Indictment "failed to state any amount of
16 pseudoephedrine attributable to Vega; a necessary element of the
17 offense." Petitioner's argument is without merit. See
18 *discussion supra*.

19 Although Petitioner asserts that he does not wish to
20 withdraw his guilty plea, Petitioner claims that he did not
21 knowingly or voluntarily enter into the Plea Agreement:

22 Vega could not have 'knowingly' or
23 'intelligently' entered into the Plea
24 Agreement in this case. Without knowing what
25 his sentence would be, Vega could not have
26 'intelligently' entered into the agreement.
The prosecutor in this case could not have
known what sentence could or would be meted
out to Vega, but wanted Vega so intimidated
that he would sign anything that resembled

1 less than what he was being told he could
2 get.

3 ...

4 Appeal waivers are most often one-sided, are
5 constitutionally suspect and counter to
6 public policy. Whether any waiver can be
7 knowing and intelligent, when what is being
8 waived is the right to appeal errors that
9 have yet to occur, should be considered when
10 determining issues regarding plea agreement
11 waivers. No appeal waiver (before the fact)
12 can be knowing and intelligent. Appeal
13 waivers offend judicial integrity by
14 foreclosing from review errors surrounding a
15 defendant's sentence. Given the bargaining
16 superiority of the government, agreements to
17 waive sentencing appeals become suspect as
18 adhesion contracts.

19 Petitioner's contentions are without merit. During the
20 change of plea colloquy, Petitioner admitted under oath that he
21 had read the Plea Agreement and discussed it with his attorney;
22 that he understood the Plea Agreement; that he understood that he
23 was waiving his right to appeal; that he understood the minimum
24 and maximum penalties that could be imposed at sentencing; that
25 he understood that the Court was not bound by the Plea Agreement
26 and could sentence Petitioner pursuant to the Sentencing
Guidelines, and that, other than as set forth in the Plea
Agreement, no promises or threats were made to get him to enter
into the Plea Agreement and plead guilty pursuant to its terms.
Petitioner's assertions that his guilty plea was not
"intelligently" made because he did not know the exact sentence
that would be imposed and because an appeal waiver is an
"adhesion contract" are belied by this record. Further,

1 Petitioner's contention that he does not seek by this Section
2 2255 motion to set aside his guilty plea negates any validity to
3 his arguments that the plea was not intelligently entered.

4 For the reasons stated:

5 1. Petitioner Jesus Olivarez Vega's motion to vacate, set
6 aside or correct sentence pursuant to 28 U.S.C. § 2255 is DENIED;

7 2. The Clerk of the Court is directed to enter JUDGMENT FOR
8 RESPONDENT.

9 IT IS SO ORDERED.

10 Dated: July 23, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE